

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN
Approving in Part, Dissenting in Part

Re: *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, D/B/A/ Innovative Telephone (File No. EB-04-MD-002)*

I am troubled by today's decision that finds the Virgin Islands Telephone Corporation ("Vitelco") liable for refunds for overearnings on 1997 interstate access rates on the basis that such rates were not "deemed lawful" under section 204(a)(3) of the Communications Act.

Under section 204(a)(3), a local exchange carrier's access tariff, filed on a streamlined basis, is "deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action...before the end of that 7 day or 15-day period, as appropriate.¹ The "deemed lawful" language in section 204(a)(3) immunizes from challenge those rates that are not suspended or investigated before a finding of unlawfulness.² Filing carriers are not subject to liability for damages when tariffs take effect, without suspension, under section 204(a)(3) and even if they are subsequently determined to be unlawful in a section 205 investigation or a section 208 complaint proceeding.

On June 27, 1997, the Common Carrier Bureau ("Bureau") issued an order suspending and setting for investigation Vitelco's July 1997 to December 1997 tariff filing.³ On July 28, 1997, on its own motion, the Bureau issued an order reconsidering its decision to suspend and investigate Vitelco's tariff and declining to investigate that tariff.⁴

Today's action finds that the Bureau's *Suspension Order* "stripped Vitelco's July 1997 tariff of their deemed lawful status,"⁵ even though in the subsequent *Reconsideration Order* the Bureau reversed its decision to investigate the tariff. The Commission finds that while the Bureau had the authority to strip the "deemed lawful" status from Vitelco's 1997 access rates, the *Reconsideration Order* cannot restore the lawfulness of Vitelco's rates because the Bureau does not have the authority to issue such order.⁶

Today's decision essentially endorses the Bureau's ability, on delegated authority, to deny the presumed "deemed lawful" status associated with a carrier's streamlined tariff filing and effectively foreclose Commission review of that decision. On its own, the Bureau suspended and set for investigation Vitelco's tariff filing. That action revoked the "deemed lawful" status of the tariff. One month later, however, the Bureau reversed its decision to investigate the tariff and the lawfulness of Vitelco's tariff was thus never subsequently addressed. A procedural mechanism that enables the Bureau

¹ 47 USC 204(a)(3).

² See, *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170 at paras.19-21 (1997) ("*Streamlined Tariff Order*").

³ *1997 Annual Access Tariff Filings*, Memorandum Opinion and Order, Suspension Order, 13 FCC Rcd 5677 (Com. Car. Bur. June 27, 1997) ("*Suspension Order*").

⁴ *1997 Annual Access Tariff Filings*, Order Designating issues for Investigation Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 11417 (Com. Car. Bur. July 28, 1997) ("*Reconsideration Order*")

⁵ *Order* at paras. 13, 37.

⁶ Under section 5(c) of the Act, the Commission may not delegate to a Bureau the authority to take action under section 204(a)(2), i.e., to issue an order concluding a tariff investigation.

to strip carrier tariffs of their presumed lawfulness through a one-day suspension and subsequent failure to follow through on an investigation is inherently unfair and inconsistent with the intent of Section 204(a)(3). Accordingly, I approve in part and dissent in part from the order.